Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

6 March 2025 *

(Failure of a Member State to fulfil obligations – Article 258 TFEU – Protection of persons who report breaches of Union law – Directive (EU) 2019/1937 – Article 26(1) and (3) – Failure to transpose and communicate transposition measures – Article 260(3) TFEU – Application for the imposition of a lump sum – Criteria for establishing the amount of the penalty – Automatic application of a coefficient for seriousness)

In Case C-155/23,

ACTION for failure to fulfil obligations under Article 258 and Article 260(3) TFEU, brought on 14 March 2023,

European Commission, represented by J. Baquero Cruz and A. Tokár, acting as Agents,

applicant,

v

Hungary, represented by M.Z. Fehér, acting as Agent,

defendant,

THE COURT (Sixth Chamber),

composed of T. von Danwitz, Vice-President of the Court, acting as President of the Sixth Chamber, A. Kumin and I. Ziemele (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Hungarian.

Judgment

1 By its action, the European Commission claims that the Court should:

– declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (OJ 2019 L 305, p. 17), and by failing to communicate them to the Commission, Hungary has failed to fulfil its obligations under Article 26(1) and (3) of that directive;

– order Hungary to pay the Commission a lump sum corresponding to the higher of the following two amounts:

  – a daily flat-rate amount of EUR 3 500 multiplied by the number of days between the day after the expiry of the deadline for transposition of Directive 2019/1937 fixed therein and the day on which the infringement comes to an end or, failing regularisation, the date on which the judgment in the present case is delivered;

  – a minimum flat-rate amount of EUR 980 000;

– in the event that the failure to fulfil obligations established in the first indent persists until the date of delivery of the judgment in the present case, order Hungary to pay a penalty payment of EUR 13 650 per day of delay from the date of delivery of that judgment until the date on which Hungary fulfils its obligations under Directive 2019/1937; and

– order Hungary to pay the costs.

Legal context

Directive 2019/1937

2 Recitals 1 and 33 of Directive 2019/1937 state:

‘(1) … potential whistleblowers are often discouraged from reporting their concerns or suspicions for fear of retaliation. In this context, the importance of providing balanced and effective whistleblower protection is increasingly acknowledged at both [European] Union and international level.

…

(33) Reporting persons normally feel more at ease reporting internally, unless they have reasons to report externally. Empirical studies show that the majority of whistleblowers tend to report internally, within the organisation in which they work. Internal reporting is also the best way to get information to the persons who can contribute to the early and effective resolution of risks to the public interest. At the same time, the reporting person should be able to choose the most appropriate reporting channel depending on the individual circumstances of the case …’

3 Under Article 1 of that directive:

'The purpose of this Directive is to enhance the enforcement of Union law and policies in specific areas by laying down common minimum standards providing for a high level of protection of persons reporting breaches of Union law.'

4 Article 8 of that directive is thus worded:

'1. Member States shall ensure that legal entities in the private and public sector establish channels and procedures for internal reporting and for follow-up, following consultation and in agreement with the social partners where provided for by national law.

…

9. Paragraph 1 shall apply to all legal entities in the public sector, including any entity owned or controlled by such entities.

…'

5 Article 23(1) of the same directive provides:

'Member States shall provide for effective, proportionate and dissuasive penalties applicable to natural or legal persons that:

…

(c) bring vexatious proceedings against persons referred to in Article 4;

…'

6 Article 26 of Directive 2019/1937 provides:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 17 December 2021.

…

3. When Member States adopt the provisions referred to in paragraphs 1 and 2, those provisions shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made. They shall forthwith communicate to the Commission the text of those provisions.'

The 2023 Communication

7 Communication 2023/C 2/01 from the Commission, entitled 'Financial sanctions in infringement proceedings' (OJ 2023 C 2, p. 1; 'the 2023 Communication'), devotes points 3 and 4 thereof to the 'penalty payment' and the 'lump sum payment', respectively.

8 Point 3.2 of the 2023 Communication, which concerns the application of the coefficient for seriousness when calculating the daily penalty payment, provides:

‘An infringement concerning a … failure to notify measures transposing a directive adopted under a legislative procedure is always considered serious. To adapt the amount of the penalty to the specific circumstances of the case, the Commission determines the coefficient for seriousness on the basis of two parameters: the importance of the Union rules breached or not transposed and the effects of the infringement on general and particular interests.

…’

9 Point 3.2.2 of that communication states:

‘For actions brought under Article 260(3) TFEU, the Commission systematically applies a coefficient for seriousness of 10 in case of a complete failure to notify transposition measures. In a Union based on the respect of the rule of law, all legislative directives are to be considered of equal importance and require complete transposition by the Member States within the deadlines that they set.

In the case of a partial failure to notify transposition measures, the importance of the transposition gap is to be considered when setting the coefficient for seriousness which is lower than 10. In addition, the effects of the infringement on general and particular interests may be taken into account …’

10 Under point 3.3 of the said communication, entitled ‘Application of the coefficient for duration’:

‘…

The coefficient for duration is expressed as a multiplier of between 1 and 3. It is calculated at a rate of [0.10] per month from the date of the first judgment or from the day following the expiry of the deadline for transposition of the directive in question.

…’

11 Point 3.4 of the same communication, entitled ‘Member State’s capacity to pay’, provides:

‘…

The level of sanction required to serve as a deterrent will vary according to Member States’ capacity to pay. This deterrent effect is reflected in the n factor. It is defined as a weighted geometric average of the gross domestic product (GDP) of the Member State concerned compared to the average of the Member States’ GDPs, with a weight of two, and of the population of the Member State concerned, compared to the average of Member States’ populations, with a weight of one. This represents the capacity to pay of the Member State concerned in relation to the other Member States’ capacity to pay:

$$\text{n factor} = \left(\frac{\text{GDP}_\text{n}}{\text{GDP}_\text{avg}}\right)^{2/3} \times \left(\frac{\text{Pop}_\text{n}}{\text{Pop}_\text{avg}}\right)^{1/3}$$

…

The Commission has decided to revise its method for calculating the n factor, which now predominantly relies on Member States' GDP and secondarily on their population as a demographic criterion allowing a reasonable deviation between the various Member States to be maintained. Taking into account Member States' population for one third of the calculation of the n factor reduces to a reasonable degree the variation of Member States' n factors, as compared to a calculation based solely on Member States' GDP. It also adds an element of stability in the calculation of the n factor, since population is unlikely to vary significantly on an annual basis. In contrast, a Member State's GDP might experience higher annual fluctuations, in particular in periods of economic crisis. At the same time, since the Member State's GDP still accounts for two thirds of the calculation, it remains the predominant factor for the purposes of assessing its capacity to pay.

…'

12 Point 4.2 of the 2023 Communication sets out the calculation method for the lump sum as follows:

'The lump sum is calculated in a manner broadly similar to the method for calculating the penalty payment, that is:

– multiplying a flat-rate amount by a coefficient for seriousness,

– multiplying the result by the n factor,

– multiplying the result by the number of days the infringement persists …

…'

13 Point 4.2.1 of that communication provides:

'To calculate the lump sum, the daily amount is to be multiplied by the number of days the infringement persists. The latter is defined as follows:

…

– for actions brought under Article 260(3) TFEU, this is the number of days between the day after the expiry of the deadline for transposition set out in the directive at issue and the date the infringement comes to an end, or, failing compliance, the date of the delivery of the judgment under Article 260 TFEU.

…'

14 According to point 4.2.2 of the said communication:

'For the calculation of the lump sum, the Commission applies the same coefficient for seriousness and the same fixed n factor as for the calculation of the penalty payment …

The flat-rate amount for the lump sum is lower than for penalty payments. …

The flat-rate amount applicable for the lump sum is set out in point 2 of … Annex I.

…'

15 Annex I to the same communication, entitled 'Data used for determining financial sanctions proposed to the Court', provides, in point 2 thereof, that the flat-rate amount for the lump sum payment mentioned in point 4.2.2 of the 2023 Communication is fixed at EUR 1 000 per day, that is one third of the flat-rate for penalty payments, and, in point 3 thereof, that the 'n' factor for Hungary is set at 0.35. In point 5 of that Annex I, it is stated that the minimum lump sum fixed for that Member State amounts to EUR 980 000.

The pre-litigation procedure and the procedure before the Court

16 On 27 January 2022, the Commission sent a letter of formal notice to Hungary, criticising it for having failed to communicate to it the laws, regulations or administrative provisions necessary to comply with Directive 2019/1937, the transposition deadline of which had expired on 17 December 2021. In its replies of 18 March and 3 May 2022, Hungary informed the Commission that the necessary provisions were being drafted, the transposition of that directive into national law requiring the drafting of a new law and regulation in the form of a government decree. The enactment of that law was envisaged for the end of November 2022.

17 With no subsequent communication relating to the transposition of Directive 2019/1937 having been sent, the Commission, on 22 July 2022, addressed a reasoned opinion to Hungary, calling on it to comply with its obligations under that directive within a period of two months of receipt of that opinion.

18 On 13 September 2022, Hungary notified to the Commission Law No CLXV of 2013 on complaints and public interest reports and Government Decree No 50/2013 (II.25) on the integrity management system within public administrative bodies and the arrangements for the reception of interest representatives, as provisions enabling the partial transposition of Directive 2019/1937.

19 In its reply of 15 September 2022 to the reasoned opinion, Hungary indicated that the preparation of the draft law enabling the full transposition of that directive was underway.

20 Taking the view that that Member State had still not complied with its obligations, the Commission decided, on 14 March 2023, to bring the present action before the Court.

21 By decision of the President of the Court of 7 January 2024, the proceedings were stayed pending delivery of the judgment in Case C-147/23. Following the delivery of the judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)* (C-147/23, EU:C:2024:346), the proceedings in the present case were resumed by decision of the President of the Court of the same day.

22 By document of 30 September 2024, the Commission informed the Court that the transposition of Directive 2019/1937 by Hungary could be deemed to have been completed on 24 July 2023, the date of entry into force of Law No XXV of 2023 on the rules relating to complaints, public interest reports and whistleblowers and of Government Decree No 225/2023 of 8 June 2023 designating the government bodies required to set up a separate system for reporting abuses.

Accordingly, that institution, first, partially abandoned its action, withdrawing its application for the imposition of a penalty payment, and, second, modified its head of claim seeking an order that that Member State pay a lump sum, claiming, on that basis, an amount of EUR 2 040 500.

The action

Failure to fulfil obligations under Article 258 TFEU

Arguments of the parties

23 The Commission points out that, in accordance with the third paragraph of Article 288 TFEU, Member States are required to adopt the provisions necessary to transpose directives into their national legal system, within the periods laid down in those directives, and to communicate those provisions to it immediately.

24 That institution explains that the question whether a Member State has failed to fulfil those obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion which the Commission addressed to that Member State.

25 In the case at hand, Hungary had not adopted the relevant provisions or informed the Commission of their adoption before the expiry of the period laid down in the reasoned opinion of 22 July 2022.

26 Hungary indicates that Law No XXV of 2023 was published on 25 May 2023 to enter into force on the 60th day following that date. It states that it was also on that date that Government Decree No 225/2023, adopted pursuant to the authorisation granted by Law No XXV of 2023, was due to enter into force. That Member State also claims that it took steps to notify that law to the Commission immediately after its publication, that is to say, on 26 May 2023. Consequently, Hungary considers that the transposition of Directive 2019/1937 was complete on the date of entry into force of the said law and of Government Decree No 225/2023 relating thereto, such that the Commission's action should be dismissed.

27 In the alternative, Hungary points out that, during the pre-litigation procedure, it notified Law No CLXV of 2013 to the Commission as a measure partially transposing Directive 2019/1937. In that regard, relying on the judgment of 16 July 2020, *Commission* v *Ireland (Anti-money laundering)* (C-550/18, EU:C:2020:564), Hungary submits that the absence of any reference to that directive in the notified national provisions does not preclude them from being taken into account as measures of partial transposition, since the reference to that directive is a mere formality.

28 In its reply, the Commission states that Law No XXV of 2023 and Government Decree No 225/2023, which were notified to it by Hungary as provisions enabling Directive 2019/1937 to be transposed, had not entered into force by the day on which that pleading was lodged, namely 12 July 2023.

29 Moreover, as regards the provisions of existing legislation notified by Hungary during the pre-litigation procedure, the Commission notes that no correlation table was sent to it by that Member State. Such a document, however, is all the more crucial since the notified provisions stem from broad and general legislation, which alone do not enable the Commission to assess their relevance as measures transposing the provisions of Directive 2019/1937.

30 In any event, the Commission points out that the transposition of a directive must result from a specific measure containing a reference to that directive. It is not a mere formality, as such a reference enables the beneficiaries of the rights they derive from the transposing measure to know its origin and the consequences which flow from it.

31 In its rejoinder, Hungary states that it sent to the Commission, on 14 June 2023, a correlation table setting out the provisions of national law intended to transpose Directive 2019/1937.

32 Furthermore, the Commission cannot conclude that there has been no transposition or no notification of transposing provisions on the sole ground that the provisions notified to it do not contain a reference to that directive.

33 Last, that Member State states, in its observations of 4 November 2024 in response to the Commission's additional claims of 30 September 2024, that that institution cannot maintain its claim that that Member State should be ordered to pay a lump sum, having regard to the various measures transposing Directive 2019/1937 which had been notified to the Commission before the adoption of Law No XXV of 2023 and Government Decree No 225/2023.

Findings of the Court

34 Under Article 26(1) of Directive 2019/1937, Member States were to bring into force, by 17 December 2021, the laws, regulations and administrative provisions necessary to comply with that directive. In addition, Article 26(3) of that directive stipulates that, when Member States adopt those measures, they are to contain a reference to that directive or be accompanied by such a reference at the time of their official publication. Moreover, pursuant to that Article 26(3), it fell to the Member States to communicate to the Commission the text of the said national provisions.

35 In accordance with settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, the Court being unable to take account of any subsequent changes (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 28 and the case-law cited).

36 The Court has moreover repeatedly held that if a directive expressly requires Member States to ensure that the necessary measures transposing the directive include a reference to it or that such reference is made when those measures are officially published, it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question (judgment of 14 March 2024, *Commission* v *Latvia (European Electronic Communications Code)*, C-454/22, EU:C:2024:235, paragraph 33 and the case-law cited).

37 In the case at hand, after having found that Hungary had not communicated to it the provisions necessary to transpose Directive 2019/1937, the Commission sent that Member State, on 22 July 2022, a reasoned opinion, calling on it to comply with the obligations referred to therein within a period of two months of receipt of the opinion.

38 As is apparent from the defence and the rejoinder lodged by Hungary in the present proceedings, on the expiry of that period, that Member State had not adopted those provisions and, therefore, nor had it communicated them to the Commission.

39 It is true that, on 13 September 2022, Hungary notified to the Commission Law No CLXV of 2013 on complaints and public interest reports and Government Decree No 50/2013 (II.25) as measures partially transposing Directive 2019/1937. In addition, that Member State indicated, in its reply to the reasoned opinion, that the preparation of the draft law transposing that directive was underway.

40 However, it is appropriate to find, first, that, by indicating that the transposition of Directive 2019/1937 had to be completed in the course of 2023, Hungary acknowledges that full transposition of that directive into national law had not been achieved either by the expiry of the period laid down in Article 26(1) thereof, namely 17 December 2021, or by the expiry of the period laid down in the reasoned opinion, namely 22 September 2022.

41 Second, as regards the provisions of national law notified to the Commission during the pre-litigation procedure, in the light of the case-law referred to in paragraph 36 above, the fact that the law of a Member State in force before the entry into force of Directive 2019/1937 already complied with that directive is not sufficient to exclude the obligation on that Member State to transpose that directive into its legal order and, therefore, to justify such a failure to fulfil obligations (judgment of 14 March 2024, *Commission* v *Latvia (European Electronic Communications Code)*, C-454/22, EU:C:2024:235, paragraph 42).

42 It is necessary to recall that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty which require that, where the directive is intended to create rights for individuals, the beneficiaries should be enabled to know the full extent of their rights (judgment of 12 May 2022, *U.I. (Indirect customs representative)*, C-714/20, EU:C:2022:374, paragraph 59).

43 As the provisions of national law notified by Hungary during the pre-litigation procedure contain no reference to Directive 2019/1937, however, they cannot be regarded as satisfying the requirements set out in the preceding paragraph.

44 It must therefore be held that, by having failed, on the expiry of the period prescribed in the reasoned opinion of 22 July 2022, to adopt the laws, regulations and administrative provisions necessary to comply with Directive 2019/1937 and, therefore, by having failed to communicate them to the Commission, Hungary has failed to fulfil its obligations under Article 26(1) and (3) of that directive.

The application submitted under Article 260(3) TFEU

Arguments of the parties

45 With a view to fixing the amount of the lump sum, the Commission relies on the general principles referred to in point 2 of the 2023 Communication and on the method of calculation set out in points 3 and 4 of that communication. In particular, that institution states that the amount of that financial penalty must be determined on the basis of the following fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty has a deterrent effect in order to prevent repeat infringements.

46 With regard, in the first place, to the seriousness of the infringement, the Commission points out that the applicable coefficient under the 2023 Communication is between a minimum of 1 and a maximum of 20. That institution explains that, in accordance with point 3.2.2 of that communication, it systematically applies a coefficient for seriousness of 10 in the case of a complete failure to notify the provisions transposing a directive, as any failure to transpose a directive or to notify those provisions is of the same degree of seriousness, regardless of the nature of the provisions of the directive concerned.

47 In the second place, as regards the duration of the infringement, the Commission explains that that equates, as regards the calculation of the lump sum, to the number of days that the infringement persists. That duration is calculated in accordance with point 4.2.1 of the 2023 Communication and corresponds to the number of days between the day following the expiry of the deadline for transposition of the directive in question and the day on which the infringement ceased.

48 As for, in the third place, the criterion relating to the need to ensure that the penalty has a deterrent effect taking into consideration the capacity of the Member State concerned to pay, the Commission states that that criterion is expressed by the 'n' factor set for each Member State in point 3 of Annex I to the 2023 Communication. It is calculated on the basis of the ratio between the GDP of the State concerned and the national average GDP of the European Union multiplied by the ratio between the population of that State and the national average population of the European Union. The first ratio is assigned a two-thirds weighting, whereas the second is assigned a one-third weighting. Pursuant to that point 3, the 'n' factor of Hungary is 0.35.

49 Accordingly, the Commission proposes, pursuant to point 4.2 of the 2023 Communication, using a coefficient for seriousness of 10 and applying the 'n' factor of 0.35. The product of those two elements should be multiplied by the flat-rate amount of the lump sum fixed in point 2 of Annex I to that communication, that is to say, EUR 1 000, which amounts to a sum of EUR 3 500, to be multiplied by the number of days that the infringement has persisted, in accordance with point 4.2.1 of the said communication. The Commission states that the payment of that lump sum must be imposed provided that it is greater than EUR 980 000, the amount of the minimum lump sum fixed for Hungary in point 5 of Annex I to the 2023 Communication.

50 In its defence, Hungary observes, first of all, that the Commission's proposals relating to the amount of the lump sum do not take into account, first, the fact that Law No XXV of 2023 was published on 25 May 2023 and was due to enter into force, together with Government Decree No 225/2023, on 24 July 2023, thereby completing the transposition of Directive 2019/1937, and, second, that elements of the existing legislation partially transposing that directive had been notified to the Commission during the pre-litigation procedure.

51 Next, Hungary points out, as a mitigating circumstance, that the present action is the first infringement procedure against it on the basis of Article 260(3) TFEU.

52 Last, the fact that numerous Member States were delayed in transposing Directive 2019/1937 demonstrates the serious difficulties which national legal systems face in the adoption of national transposition provisions.

53 Hungary contends, principally, that the Commission's claims should be rejected and, in the alternative, that the amount of the proposed lump sum should be reduced.

54 In its reply, the Commission states that, as Hungary did not send it a correlation table when notifying the elements of its existing legislation which constitute measures partially transposing Directive 2019/1937, it is unable to assess the relevance of those measures.

55 In addition, as financial penalties must be determined on the basis of objective criteria, the Commission submits that the circumstances put forward by Hungary in its defence cannot justify a reduction in the amount of the proposed financial penalties.

56 In its rejoinder, Hungary submits that the Commission cannot refrain from taking account of the existing legislation that it notified to it when determining the amount of the financial penalties. The Commission's approach would lead to Member States being discouraged from identifying and notifying, prior to the full transposition of a directive, the national provisions which, although predating the adoption of such a directive, would ensure at least a partial transposition thereof.

57 For those reasons, Hungary reiterates its principal claim that the Commission's action should be dismissed and, in the alternative, that the amount of the proposed lump sum should be reduced.

58 In its additional claims of 30 September 2024, the Commission, taking the view that Directive 2019/1937 had been fully transposed on 24 July 2023, amends the amount of the lump sum sought. It proposes that the number of days that the infringement persisted should be considered to be between 18 December 2021, that is to say, the day after the expiry of the deadline for transposing that directive, and 23 July 2023, that is to say, the day before the entry into force of the transposing measures. It follows that the proposed daily amount of EUR 3 500 ($10 \times 0.35 \times 1\,000$) is to be multiplied by the number of days that the infringement persisted, namely 583 days. The amount of the lump sum sought is therefore EUR 2 040 500.

59 In its observations of 4 November 2024 on those claims, Hungary recalls the position that it expressed in the rejoinder.

Findings of the Court

60 The first subparagraph of Article 260(3) TFEU provides that when the Commission brings a case before the Court pursuant to Article 258 TFEU on the ground that the Member State concerned has failed to fulfil its obligation to notify provisions necessary to transpose a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. In accordance with the second subparagraph of Article 260(3) TFEU, if the

Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation is to take effect on the date set by the Court in its judgment.

61 Since, as is apparent from paragraph 44 above, it is established that, on the expiry of the period laid down in the reasoned opinion of 22 July 2022, Hungary had neither adopted nor, therefore, communicated to the Commission the laws, regulations and administrative provisions necessary to transpose the provisions of Directive 2019/1937 into its domestic law, the failure thus established falls within the scope of Article 260(3) TFEU.

62 Furthermore, it should be recalled that the objective pursued by the system set out in Article 260(3) TFEU is not only to induce Member States to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, but also to simplify and speed up the procedure for imposing financial penalties for failures to comply with the obligation to notify national provisions transposing a directive adopted through a legislative procedure (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 57 and the case-law cited).

63 In order to achieve that objective, Article 260(3) TFEU provides for the imposition, inter alia, of a lump sum as a financial penalty.

64 The imposition of a lump sum is based on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period (see, to that effect, judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 59 and the case-law cited).

65 In that regard, the Commission states reasons for the nature and amount of the financial penalty sought, taking into account the guidelines which it has adopted, such as those in its communications which, although not binding on the Court, contribute to ensuring that the action brought by the Commission is transparent, foreseeable and consistent with legal certainty (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 60 and the case-law cited).

66 As regards whether it is appropriate for a lump sum to be imposed, in each case, it is for the Court to determine, in the light of the circumstances of the case before it and according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties that are appropriate, in particular, for preventing the recurrence of similar infringements of EU law (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 62 and the case-law cited).

67 In the case at hand, it must be found that, notwithstanding the fact that Hungary cooperated with the Commission services throughout the pre-litigation procedure and that it communicated to it provisions of its existing law capable of constituting a transposition of certain provisions of Directive 2019/1937, all the legal and factual elements surrounding the breach of obligations established are an indication that if the future repetition of similar infringements of EU law is to be effectively prevented, a dissuasive measure must be adopted, such as the imposition of a lump sum. First of all, it was only after the receipt of the reasoned opinion of 22 July 2022 that Hungary, on 13 September 2022, notified that institution of the provisions of its national law that it regarded as transposing certain provisions of Directive 2019/1937. Next, that notification was made only a

few days before the expiry of the period laid down in the reasoned opinion of 22 July 2022, even though the provisions notified by that date already existed in the national legal order before the adoption of that directive. Last, the notified provisions did not permit an effective, specific and full transposition of the directive, as has been found in paragraph 43 above.

68 It is appropriate to note, on the one hand, that those provisions, notified before the expiry of the period laid down in the reasoned opinion of 22 July 2022, did not contain any reference to Directive 2019/1937. It is settled, however, that the notification required of the Member States, in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU, is intended to facilitate the achievement of the Commission's tasks, which consist, inter alia, under Article 17 TEU, in ensuring the application of the provisions of the Treaties and of measures adopted by the institutions pursuant to them. That notification must therefore contain sufficiently clear and precise information on the substance of the national rules which transpose a directive. Thus, the said notification, to which a correlation table may be added, must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by that directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive in full (judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU – High-speed networks)*, C-543/17, EU:C:2019:573, paragraph 51).

69 On the other hand, as has been recalled in paragraph 36 above, if a directive expressly requires Member States to ensure that the necessary measures transposing the directive include a reference to it or that such reference is made when those measures are officially published, it is, in any event, necessary for Member States to adopt a specific measure transposing the directive in question.

70 Therefore, since the provisions notified by Hungary before the expiry of the period laid down in the reasoned opinion of 22 July 2022 did not contain any reference to Directive 2019/1937 and had not been accompanied by an explanatory document, they cannot be relied on in order to call into question the imposition of a lump sum in the present case.

71 As regards the calculation of the amount of that lump sum, it should be recalled that, under Article 260(3) TFEU, the Court alone has the power to impose a financial penalty on a Member State. However, in the context of proceedings brought on the basis of that provision, the Court has only a limited power to assess, since, where it finds that there is a failure to fulfil obligations, the Commission's proposals are binding on it as to the nature of the financial penalty which the Court may impose and the maximum amount of the penalty which it may set (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 67 and the case-law cited).

72 In exercising its discretion in the matter, as delimited by the Commission's proposals, it is for the Court to fix the amount of the lump sum which a Member State may be ordered to pay pursuant to Article 260(3) TFEU, in an amount appropriate to the circumstances and proportionate to the failure to fulfil obligations. Relevant considerations in that respect include factors such as the seriousness of the failure to fulfil obligations, the length of time for which the failure has persisted and the relevant Member State's ability to pay (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraphs 68 and 87 and the case-law cited).

73 It should likewise be remembered that, in the context of that discretion, guidelines such as communications from the Commission are not binding on the Court but rather contribute to ensuring that the Commission's own actions are transparent, foreseeable and consistent with legal certainty when that institution makes proposals to the Court (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 69 and the case-law cited).

74 In the present case, the Commission relied on the 2023 Communication to justify its application seeking that Hungary be ordered to pay a lump sum, as well as to fix the amount thereof.

75 In the first place, as regards the seriousness of the failure to fulfil obligations established, it follows from point 3.2 of the 2023 Communication that, according to the Commission, the failure to notify the provisions transposing a directive adopted under a legislative procedure is always considered to be serious. Accordingly, that failure justifies the automatic application of a coefficient for seriousness of 10.

76 Hungary contests the level of that coefficient and the automatic nature of its application in the circumstances of the failure established.

77 In that regard, it should be borne in mind that the obligation to adopt provisions for the purposes of ensuring that a directive is transposed in full and the obligation to notify them to the Commission are fundamental obligations incumbent on the Member States in order to ensure optimal effectiveness of EU law and that failure to fulfil those obligations must, therefore, be regarded as definitely serious (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 72 and the case-law cited).

78 In the present case, it must be observed that Directive 2019/1937 is a crucial instrument of EU law in that it lays down, pursuant to Article 1 thereof, read in conjunction with recital 1 thereof, common minimum standards providing for a high level of balanced and effective protection of persons reporting breaches of EU law in areas in which such breaches are likely to be particularly harmful to the general interest. By establishing a system for the protection of persons reporting breaches of EU law in a work-related context, that directive contributes to preventing harm to the public interest, in particularly sensitive areas, such as public procurement, the prevention of money laundering and terrorist financing, and the protection of the environment or of the financial interests of the European Union. Thus, the provisions of the directive provide for the obligation, for entities in both the public and private sectors, to establish internal reporting channels and procedures for receiving reports and their follow-up, whilst safeguarding the rights of the persons reporting breaches of EU law and the conditions under which those persons can qualify for the protection laid down therein (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 73).

79 The full non-transposition of the provisions of Directive 2019/1937 within the period prescribed necessarily undermines EU law and its uniform and effective application, since breaches of EU law are unlikely to be reported if the persons with knowledge of such breaches are not protected against any retaliation (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 74).

80 That said, the amount of the financial penalties imposed on a Member State pursuant to Article 260(3) TFEU must be appropriate to the circumstances and proportionate to the failure to fulfil obligations (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 75), as has been recalled in paragraph 72 above.

81 It is for that reason that the Court has held that the automatic application of the same coefficient for seriousness in all cases in which a directive is not fully transposed and, therefore, the measures transposing that directive are not communicated necessarily precludes the amount of the financial penalties from being tailored to the circumstances characterising the failure to fulfil obligations and proportionate penalties from being imposed (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 76).

82 In that regard, the Court has specified that, by presuming that a failure to comply with the obligation to notify the transposition measures for a directive must be regarded as being of the same degree of seriousness regardless of the directive concerned, the Commission is unable to tailor the financial penalties according to the consequences of the failure to comply with that obligation on private and public interests, as is provided for in point 3.2.2 of the 2023 Communication (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 77).

83 In the case at hand, Hungary has argued, in its defence, that certain rules protecting persons who report breaches of law existed in its legislation before the adoption of Law No XXV of 2023 and Government Decree No 225/2023.

84 Thus, on 12 June 2023, Hungary notified to the Commission 11 laws which Hungary claims transposed certain provisions of Directive 2019/1937.

85 In those circumstances, it must be found that it has not been established that the consequences of the failure established in the present case for private and public interests were as negative as in the case of a complete failure to transpose Directive 2019/1937 (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 92).

86 The fact remains that the provisions notified by Hungary are scattered throughout the national legal order and, contrary to the requirement laid down in Article 26(3) of Directive 2019/1937, do not make explicit reference to the protection prescribed by that directive.

87 The lack of clear and specific rules concerning the protection of persons who report breaches of EU law, as provided for in Directive 2019/1937, is a barrier to the effective protection of those persons and can, therefore, call into question the uniform and effective application of EU law in the areas covered by that directive (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 94).

88 As has been recalled in paragraph 78 above, by establishing a high level of protection of persons reporting breaches of EU law in a work-related context, that directive contributes to preventing harm to the public interest, in particularly sensitive areas, such as public procurement, the prevention of money laundering and terrorist financing, and the protection of the environment or of the financial interests of the European Union (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 95).

89 That being so, as has been stated in paragraph 79 above, without effective protection, persons with knowledge of a breach of EU law in such areas may be discouraged from reporting them where, by so doing, they may open themselves to retaliation (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 96).

90 Accordingly, in the light of the objective set out in Article 1 of Directive 2019/1937, read in conjunction with recital 1 thereof, the failure to adopt the laws, regulations and administrative provisions necessary to transpose the directive fully and precisely is particularly serious (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 97).

91 As regards the mitigating circumstances relied on by Hungary, it should be emphasised that the argument that that Member State is, for the first time, the subject of infringement proceedings under Article 260(3) TFEU has no bearing on the consequences of the failure to transpose the directive at issue for private and public interests. Moreover, in Case C-310/12, that Member State had to defend itself against an action for failure to fulfil obligations under that provision until such time as, in the light of Hungary's notification of the full transposition of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste (OJ 2008 L 312, p. 3), the Commission withdrew its action.

92 In addition, according to settled case-law, a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfil its obligations under the Treaty (judgment of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 106 and the case-law cited).

93 In those circumstances, Hungary cannot rely, as a circumstance mitigating the seriousness of its failure to fulfil obligations, on the delay by certain Member States in transposing Directive 2019/1937.

94 In the second place, when assessing the duration of the infringement, it must be recalled that, as regards the beginning of the period which must be taken into account in order to fix the amount of the lump sum, the relevant date for evaluating the duration of the infringement at issue is not the date of expiry of the period laid down in the Commission's reasoned opinion, but the date of expiry of the transposition deadline laid down in the directive in question, namely 17 December 2021 (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 80 and the case-law cited).

95 It is established, however, that Hungary had not, on the expiry of the transposition deadline laid down in Article 26(1) of Directive 2019/1937, that is to say, on 17 December 2021, adopted all the laws, regulations and administrative provisions necessary to enable a specific and full transposition of that directive and, therefore, had likewise failed to communicate them to the Commission, contrary to what Article 26(3) of the said directive provides. It follows that the failure to fulfil obligations at issue, which ended only on 24 July 2023, with the entry into force of Law No XXV of 2023 and of Government Decree No 225/2023, continued for more than a year and a half.

96 In the third place, as regards the ability to pay of the Member State at issue, it is clear from the case-law of the Court that, without prejudice to the possibility for the Commission to propose financial penalties which are based on multiple criteria, with a view, in particular, to allowing a reasonable gap between the various Member States to be maintained, it is necessary to rely on

the GDP of that State as the predominant factor for the purpose of assessing its ability to pay and for the fixing of penalties that are sufficiently dissuasive and proportionate in order effectively to prevent a repeat of similar infringements of EU law in the future (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 81 and the case-law cited).

97 In that regard, the Court has repeatedly held that it was necessary to take account of recent trends in the Member States' GDP at the time of the Court's examination of the facts (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 82 and the case-law cited).

98 Here, the 'n' factor, which represents the capacity to pay of the Member State concerned as compared with the capacity to pay of the other Member States and is applied by the Commission in accordance with points 3.4 and 4.2 of the 2023 Communication, is defined as a weighted geometric average of the GDP of the Member State concerned, compared to the average of the Member States' GDPs, accounting for two thirds of the calculation of the 'n' factor, and of the population of the Member State concerned, compared to the average of Member States' populations, accounting for one third of the calculation of the 'n' factor, as is apparent from the equation set out in paragraph 11 above. The Commission justifies that method of calculating the 'n' factor both by reference to the objective of maintaining a reasonable gap between the 'n' factors of the Member States, as compared to a calculation based solely on Member States' GDPs, and the objective of ensuring a degree of stability in the calculation of the 'n' factor, since population is unlikely to vary significantly on an annual basis (judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraph 83 and the case-law cited).

99 However, the Court has held that, when determining the capacity to pay of the Member State concerned, a demographic criterion cannot be taken into account in accordance with the detailed rules laid down in points 3.4 and 4.2 of the 2023 Communication as part of the method of calculating the 'n' factor (see, to that effect, judgment of 25 April 2024, *Commission* v *Poland (Whistleblowers directive)*, C-147/23, EU:C:2024:346, paragraphs 84 to 86).

100 Accordingly, in accordance with the case-law recalled in paragraph 96 above and in the absence of a relevant criterion put forward by the Commission to ensure stability of calculation and to maintain a reasonable gap between the 'n' factors of the Member States, it is by taking into account the average GDP of Hungary over the last three years that the amount of the lump sum should be fixed.

101 In the light of those considerations and having regard to the discretion conferred on the Court by Article 260(3) TFEU, which provides that the Court cannot, in respect of the lump sum, fix an amount exceeding that specified by the Commission, the view must be taken that, in order effectively to prevent a repeat of infringements similar to that resulting from the infringement of Article 26(1) and (3) of Directive 2019/1937 and undermining the optimal effectiveness of EU law in the future, a lump sum must be imposed, the amount of which must be fixed at EUR 1 750 000.

Costs

102 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Hungary has been unsuccessful, the latter must be ordered to bear its own costs and to pay those incurred by the Commission.

On those grounds, the Court (Sixth Chamber) hereby:

1. **Declares that, by having failed, on the expiry of the period laid down in the reasoned opinion of the European Commission of 22 July 2022, to adopt the laws, regulations and administrative provisions necessary to comply with Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law and, therefore, by having failed to communicate them to the Commission, Hungary has failed to fulfil its obligations under Article 26(1) and (3) of that directive;**

2. **Orders Hungary to pay to the European Commission a lump sum in the amount of EUR 1 750 000;**

3. **Orders Hungary to bear its own costs and to pay those incurred by the European Commission.**

[Signatures]